

No. 14079.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LESSIE B. HENRY and MILDRED LOUISE McDAVIS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	2
Statute involved	3
Statement of facts.....	4
Questions involved	7
Summary of the argument.....	7
Argument.....	8
I.	
The appellants were not unlawfully entrapped.....	8
II.	
Sufficiency of evidence in support of Counts 1 and 2 of the Indictment	9
III.	
Conviction under Counts 1, 2, 3 and 4 of the Indictment does not constitute double punishment or double jeopardy.....	10
A. Test of identity of offenses.....	10
B. There was no prejudicial error.....	11
Conclusion	12

TABLE OF AUTHORITIES CITED

CASES	PAGE
Mills v. Aderhold, Warden, 110 F. 2d 767.....	10
Parmagini v. United States, 42 F. 2d 721; cert. den., 283 U. S. 818.....	10, 12
Stein v. United States, 166 F. 2d 851; cert. den., 334 U. S. 844	8
United States v. Ginsburg, 96 F. 2d 882; cert. den., 305 U. S. 620	8
<p>Albrech v. United States, 272 U. S. 1, 47 S. Ct. 250..... 11</p> <p>Silverman v. United States, C. C. A. Mass., 1932 59 F. 2d 636, cert. den., 287 U. S. 640..... 11</p>	

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Jurisdiction.

The Indictment in this case was returned and filed on June 10, 1953, in the United States District Court for the Southern District, Central Division, the case in the District Court being numbered 22920-CD [Clk. Tr. pp. 2-5].

The Judgments and Commitments following a finding of guilty as to each defendant under Counts 1, 2, 3 and 4, and upon dismissal of Count 5 against defendant, Lessie B. Henry, upon motion of the United States Attorney, following a finding of not guilty, were made and filed on July 20, 1953 [Clk. Tr. pp. 14, 16]. The Notice of Appeal was made, served and filed by defendants on July 23, 1953 [Clk. Tr. p. 17].

Jurisdiction in the United States District Court is conferred by Title 18, United States Code, Section 3231, and jurisdiction in this Court is conferred by Title 28, United States Code, Sections 1291 and 1294.

Statement of the Case.

In Count 1 of the Indictment appellants are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 12, 1953, they did, after importation, knowingly and unlawfully receive, conceal, and facilitate the transportation of approximately 436 grains of heroin [Clk. Tr. p. 2].

In Count 2 of the Indictment, appellants are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 13, 1953, they did, after importation, knowingly and unlawfully, receive, conceal, and facilitate the transportation of approximately 430 grains of heroin [Clk. Tr. p. 3].

In Count 3 of the Indictment, appellants are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 12, 1953, they did, after importation, knowingly and unlawfully sell to Frank Stafford a certain narcotic drug, namely, approximately 436 grains of heroin [Clk. Tr. p. 3].

In Count 4 of the Indictment, appellants are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 13, 1953, they did, after importation, knowingly and unlawfully, sell to Frank Stafford, a certain narcotic drug, namely, approximately 430 grains of heroin [Clk. Tr. p. 4]. In Count 5 of the Indictment appellant, Lessie B. Henry and codefendant, Jennell James, are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 15, 1953, they did, after importa-

tion, knowingly and unlawfully, receive, conceal and facilitate the transportation of approximately 257 grains of heroin [Clk. Tr. p. 5].

Appellants Lessie B. Henry and Mildred Louise Mc-Davis were found guilty under Counts 1 through 4 inclusive, of the Indictment. Henry was found not guilty under Count 5. Defendant Jennell James was found guilty under Count 5 and takes no appeal [Clk. Tr. pp. 11-13].

Statute Involved.

Section 174, Title 21 of the United States Code, provides in pertinent part as follows:

“Section 174. Importation of narcotic drugs prohibited; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years.

* * * * *

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. As amended November 2, 1951, c. 666, Secs. 1, 5(1), 65 Statutes 767.”

Statement of Facts.

Appellants have detailed a concise, and it is opined, essentially fair and complete statement of facts. However, inasmuch as appellants in their brief would cast suspicion upon the testimony of the government witness, Frank J. Stafford, appellee desires to demonstrate by its method of presentation of Frank Stafford's testimony, that said testimony is corroborated and its veracity assured to the greatest extent possible in this type of case.*

February 9, 1953:

Frank Stafford went to an apartment house located in the 2900 block on Eleventh Street where he met with appellant Lessie B. Henry [Rep. Tr. p. 35; Corr. Rep. Tr. p. 206], and arranged with Henry to contact him later concerning a future purchase of heroin [Rep. Tr. pp. 43, 44, 45].

February 12, 1953:

A day or two later Philip P. Ross, Government Narcotics Agent, testified as to the date being February 12 [Rep. Tr. p. 208], Stafford had a telephone conversation with Henry [Corr. Rep. Tr. p. 209] wherein he told Henry that he was ready to transact the business discussed a day or two earlier [Rep. Tr. pp. 44, 47], and a second telephone conversation [Corr. Rep. Tr. p. 212] wherein he was directed by Henry to go to Washington and Western Streets and that he would be met there by someone who knew him [Rep. Tr. p. 48]. After Stafford's person and automobile had been searched and he

*[Corr. Rep. Tr. p.] refers to testimony of Government Narcotics Agent Philip P. Ross, wherein he corroborates testimony of Government witness Frank J. Stafford.

had been given \$300.00 by the narcotics officers [Rep. Tr. p. 48; Corr. Rep. Tr. p. 212] he proceeded by automobile to the appointed meeting place [Rep. Tr. p. 49; Corr. Rep. Tr. p. 212], whereat he was met by appellant Mildred Louise McDavis [Rep. Tr. p. 49; Corr. Rep. Tr. p. 213]. Stafford followed Mildred McDavis' automobile for a short distance whereupon they stopped their automobiles and Mildred McDavis joined Stafford in his automobile and directed him to drive on further [Rep. Tr. p. 51; Corr. Rep. Tr. pp. 213, 214]. After telling Stafford that she thought Henry was giving him an awful good buy Mildred McDavis requested the money and it was given to her [Rep. Tr. p. 51]. Mildred McDavis then got out of Stafford's car, into her own [Rep. Tr. p. 53; Corr. Rep. Tr. p. 213], and speaking to Stafford again after they had moved their respective automobiles to a new location [Rep. Tr. pp. 53, 54; Corr. Rep. Tr. p. 214] she instructed him that he would find the heroin in bushes upon the premises of a gas station located at 25th and Adams Streets [Rep. Tr. p. 54]. Stafford proceeded to the designated gas station, discovered the heroin in the bushes as McDavis had told him he would, and handed the heroin to Narcotics Officer Ross, who in the meantime had arrived upon the scene [Rep. Tr. p. 55; Corr. Rep. Tr. p. 214].

February 13, 1953:

Stafford made a telephone call [Corr. Rep. Tr. p. 223] at which time he spoke with Mildred McDavis who gave him the telephone number where Henry could be reached [Rep. Tr. p. 57]. Stafford then telephoned Henry [Corr. Rep. Tr. p. 223] and informed him that he wished to purchase another ounce of the stuff. Henry stated that the stuff and the price would be the same, but that he

would have to call Stafford back later [Rep. Tr. p. 58]. About two hours later Stafford received two telephone calls [Corr. Rep. Tr. pp. 223, 224] from Mildred McDavis who during the last conversation directed him to go to 29th and Normandy Streets [Rep. Tr. p. 59]. After being searched and given \$300.00 by the narcotics officers [Rep. Tr. p. 59; Corr. Rep. Tr. p. 224] Stafford proceeded to the appointed meeting place and was met by Mildred McDavis [Rep. Tr. p. 60; Corr. Rep. Tr. p. 224]. After various other movements by Stafford and McDavis similar to their movements of the previous day [Rep. Tr. pp. 60, 61; Corr. Rep. Tr. pp. 224, 225, 228], Stafford gave McDavis the \$300.00 and was told by her that he would find the narcotics inside a telephone booth located in front of a restaurant at 27th and San Pedro Streets [Rep. Tr. pp. 60, 61]. Stafford went there, found the narcotics where Mildred McDavis had told him he would [Rep. Tr. p. 61; Corr. Rep. Tr. p. 228], and went home whereat he delivered the package of narcotics to Officers Ross and Coster [Rep. Tr. p. 61; Corr. Rep. Tr. pp. 228, 232]. From his home Stafford placed a telephone call [Corr. Rep. Tr. p. 232] to Henry and told him that this boy he had picked up, is beat all up; he is bleeding all over the place. After reassuring Stafford that none of the contents of the package could leak out Henry stated that if anyone had fooled with it besides Mildred he might say that it would be wrong, but he was sure it was right because she is the only one that handled it [Rep. Tr. pp. 63, 64].

Questions Involved.

1. *Were the appellants unlawfully entrapped by government agents?*
2. *Is the evidence sufficient in support of Counts 1 and 2 of the Indictment?*
3. *Does the judgment in this case amount to double punishment or double jeopardy?*

Summary of the Argument.

Under well established principles of law the facts in this case do not constitute unlawful entrapment of the appellants because there is no showing that the corrupt intent was originated in the minds of appellants by the government agents.

The conviction under Counts 1 and 2 of the Indictment must stand because there is evidence independent of the evidence of sale showing that on the dates alleged, appellants knowingly received, concealed and facilitated the transportation of heroin. In any event, there was no prejudicial error because concurrent sentences were imposed upon appellants pursuant to their conviction under Counts 1, 2, 3 and 4 of the Indictment.

ARGUMENT.

I.

The Appellants Were Not Unlawfully Entrapped.

Entrapment exists only where government agents induce and originate a criminal intent of a defendant. There is no entrapment where criminal intent is already present in the defendant's mind and agents merely afford the opportunity for commission of the crime.

Stein v. United States (C. C. A. 9, 1948), 166 F. 2d 851, cert. den. 334 U. S. 844.

In *United States v. Ginsburg* (C. C. A. 7, 1938), 96 F. 2d 882, cert. den. 305 U. S. 620, it was held that there was no unlawful entrapment where the evidence showed that the witness, an admitted addict, informed the narcotics agents that he would be able to purchase narcotics from the defendant; that the agents, in turn, furnished the informer with money with which he approached the defendant and asked him to sell him narcotics; that defendant sold the informer narcotics; that these acts were all accomplished under the direction and at the instigation of narcotics agents who had agreed to see to it that the informer would be compensated by the government.

In the case at hand, Frank Stafford and the government agents merely presented to the appellants an opportunity to activate the criminal intent pre-existing in the appellants' minds. Appellee believes that the facts relied upon by appellants do not show unlawful entrapment and that the trial court was justified in so finding.

II.

Sufficiency of Evidence in Support of Counts 1 and 2
of the Indictment.

The evidence is sufficient to support Counts 1 and 2 of the Indictment. It is the well-settled rule that the Court on appeal will not try the facts anew, but will sustain the findings if the trier of fact had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion which was reached.

Frank Stafford testified that on February 12, 1953, he was instructed by Henry to proceed to a certain place and that there he would be met by someone who knew him [Rep. Tr. p. 48]; that he followed these instructions and was met by Mildred McDavis, who revealed to him the exact hiding place of the heroin, which was concealed in the bushes upon the premises of a gas station [Rep. Tr. p. 54].

Frank Stafford testified that on February 13, 1953, he again spoke to both Henry and Mildred McDavis upon the telephone and was directed by the latter to go to a certain meeting place. Here Mildred McDavis again revealed the exact hiding place of the heroin to Stafford, which was this time concealed within a telephone booth [Rep. Tr. p. 61].

Federal Narcotics Agent Philip P. Ross testified that on February 16, 1953, he discovered a cache of heroin in a box of groceries located in the kitchen of a house at 2945 Eleventh Street [Rep. Tr. p. 240].

Lessie B. Henry testified that he lived at 2945 Eleventh Avenue [Rep. Tr. p. 447] and that this was his mother's address [Rep. Tr. p. 448].

The trial court was justified in drawing inferences from these and other facts that from the dates alleged in Counts 1 and 2 of the Indictment the appellants, acting either singly or together, moved the heroin alleged in Counts 1 and 2 of the Indictment from the house at 2945 Eleventh Avenue and transported it to and concealed it in the places where it was subsequently found by Frank Stafford.

III.

Conviction Under Counts 1, 2, 3 and 4 of the Indictment Does Not Constitute Double Punishment or Double Jeopardy.

A. Test of Identity of Offenses.

The test to be applied in determining the question of the identity of offenses charged in two or more counts of an indictment or in separate indictments is whether each requires proof of facts which is not required by the others.

Mills v. Aderhold, Warden (C. C. A. 10, 1940),
110 F. 2d 767.

Specific reference has heretofore been made by appellee to the testimony which supports Counts 1 and 2 of the Indictment. This evidence is also more than adequate to satisfy the test as stated above.

In the case of *Parmagini v. United States* (C. C. A. 9, 1930), 42 F. 2d 721, cert. den. 283 U. S. 818, the appellant there made the identical contention under similar cir-

circumstances as appellants presently make. There the instant court answered this contention as follows:

“Under this law (Jones-Miller Act, 21 U. S. C. 174) concealment and sale are distinct offenses and therefore each act is punishable, although both occur in connection with a single transaction (citing cases). The count which states that the defendant sold morphine and concealed morphine states two distinct offenses, whether the charge of selling is under the Jones-Miller Act (21 U. S. C. 174) or under the Harrison Narcotic Law (26 U. S. C. 692). Therefore, consecutive sentences of five years for selling morphine and ten years for concealing morphine illegally imported were proper and, in the discretion of the trial court, might be made to run consecutively.

See also *Albrech v. United States*, 272 U. S. 1, 47 S. Ct. 250, and *Silverman v. United States*, C. C. A. Mass., 1932, 59 F. 2d 636, cert. den., 287 U. S. 640.”

B. There Was No Prejudicial Error.

Appellants assert that in Counts 1 and 2 of the Indictment the Government did not allege, nor at the time of trial did it prove, offenses separate from those alleged in Counts 3 and 4 of the Indictment. Appellee believes that no prejudicial error accrued to appellants even if this contention be correct.

Appellant Lessie B. Henry was sentenced to a term of imprisonment for four years and fined the sum of \$1,000.00 on each of Counts 1, 2, 3 and 4, concurrently (total fine, \$1,000.00) [Clk. Tr. p. 14]. Appellant Mildred Louise McDavis was sentenced to three years imprisonment and fined \$1.00 on each of Counts 1, 2, 3 and 4, the sentences to run concurrently (total fine, \$1.00) [Clk. Tr. p. 16].

Inasmuch as the sentences run concurrently and there is but one fine upon all four counts, there was no prejudicial error in this regard.

Parmagini v. United States, supra, page 725, and cases therein cited.

Conclusion.

The judgment should be affirmed.

Respectfully submitted,

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